

Department of Health
Notice of Rulemaking Hearing
Board for Licensing Health Care Facilities
Division of Health Care Facilities

There will be a hearing before the Board for Licensing Health Care Facilities to consider the promulgation of amendment of rules pursuant to T.C.A. §§ 4-5-202, 4-5-204, 68-11-202 and 68-11-209. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-204 and will take place in Conference Room 133 on the first floor of the Cordell Hull Building located at 425 Fifth Avenue North, Nashville, TN at 9:00 a.m. (CDST) on the 19th day of October, 2004.

Any individuals with disabilities who wish to participate in these proceedings (review these filings) should contact the Department of Health, Division of Health Care Facilities to discuss any auxiliary aids or services needed to facilitate such participation or review. Such initial contact may be made no less than ten (10) days prior to the scheduled meeting date (the date such party intends to review such filings), to allow time for the Division to determine how it may reasonably provide such aid or service. Initial contact may be made with the ADA Coordinator at the Division of Health Care Facilities, First Floor, Cordell Hull Building, 425 Fifth Avenue North, Nashville, TN 37247-0508, (615) 741-7598.

For a copy of the entire text of this notice of rulemaking hearing visit the Department of Health's web page on the Internet at www.state.tn.us/health and click on "rulemaking hearings" or contact: Steve Goodwin, Health Facility Survey Manager, Division of Health Care Facilities, 425 Fifth Avenue North, First Floor, Cordell Hull Building, Nashville, TN 37247-0508, (615) 741-7598.

Substance of Proposed Rules

Chapter 1200-8-11
Standards for Homes for the Aged

Amendments

Rule 1200-8-11-.01, Definitions, is amended by deleting paragraphs (2), (14), and (15) in their entirety and substituting instead the following language, so that as amended, the new paragraphs (2), (14), and (15) shall read:

- (2) Advance Directive. An individual instruction or a written statement relating to the subsequent provision of health care for the individual, including, but not limited to, a living will or a durable power of attorney for health care.

- (14) Health care decision. Consent, refusal of consent or withdrawal of consent to health care.
- (15) Health Care Decision-maker. In the case of an incompetent resident, or a resident who lacks decision-making capacity, the resident's health care decision-maker is one of the following: the resident's health care agent as specified in an advance directive, the resident's court-appointed legal guardian or conservator with health care decision-making authority, or the resident's surrogate as determined pursuant to Rule 1200-8-11-.12 or T.C.A. §33-3-220, the designated physician pursuant to these Rules or in the case of a minor child, the person having custody or legal guardianship.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-207, 68-11-209, 68-11-210, 68-11-211, 68-11-213, 68-11-216, and 68-11-1702.

Rule 1200-8-11-.01, Definitions, is amended by deleting paragraph (21) and re-numbering the remaining paragraphs appropriately.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-207, 68-11-209, 68-11-210, 68-11-211, 68-11-213, 68-11-216, and 68-11-1702.

Rule 1200-8-11-.01, Definitions, is amended by deleting paragraph (9) and re-numbering the remaining paragraphs appropriately.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-207, 68-11-209, 68-11-210, 68-11-211, 68-11-213, 68-11-216, and 68-11-1702.

Rule 1200-8-11-.01, Definitions, is amended by adding the following language as twenty (20), new, appropriately numbered paragraphs, so that as amended, the twenty (20), new, appropriately numbered paragraphs shall read:

- () Adult. An individual who has capacity and is at least 18 years of age.
- () Agent. An individual designated in an advance directive for health care to make a health care decision for the individual granting the power.
- () Capacity. An individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision. These regulations do not affect the right of a resident to make health care decisions while having the capacity to do so. A resident shall be presumed to have capacity to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate. Any person who challenges the capacity of a resident shall have the burden of proving lack of capacity.
- () Designated physician. A physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's

health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes such responsibility.

- () Guardian. A judicially appointed guardian or conservator having authority to make a health care decision for an individual.
- () Health care. Any care, treatment, service or procedure to maintain, diagnose, treat, or otherwise affect an individual's physical or mental condition, and includes medical care as defined in T.C.A. § 32-11-103(5).
- () Health care institution. A health care institution as defined in T.C.A. § 68-11-201.
- () Health care provider. A person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business of practice of a profession.
- () Individual instruction. An individual's direction concerning a health care decision for the individual.
- () Medically Inappropriate Treatment. Resuscitation efforts that cannot be expected either to restore cardiac or respiratory function to the resident or other medical or surgical treatments to achieve the expressed goals of the informed resident. In the case of the incompetent resident, the resident's representative expresses the goals of the resident.
- () Person. An individual, corporation, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
- () Personally informing. A communication by any effective means from the resident directly to a health care provider.
- () Power of attorney for health care. The designation of an agent to make health care decisions for the individual granting the power.
- () Qualified emergency medical service personnel. Includes, but shall not be limited to, emergency medical technicians, paramedics, or other emergency services personnel, providers, or entities acting within the usual course of their professions, and other emergency responders.
- () Reasonably available. Readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the resident's health care needs. Such availability shall include, but not be limited to, availability by telephone.

- () State. A state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.
- () Supervising health care provider. The designated physician or, if there is no designated physician or the designated physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care.
- () Surrogate. An individual, other than a resident's agent or guardian, authorized to make a health care decision for the resident.
- () Treating health care provider. A health care provider who at the time is directly or indirectly involved in providing health care to the resident.
- () Universal do not resuscitate order. A written order that applies regardless of the treatment setting and that is signed by the resident's physician which states that in the event the resident suffers cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-207, 68-11-209, 68-11-210, 68-11-211, 68-11-213, 68-11-216, and 68-11-1702.

Rule 1200-8-11-.02, Licensing Procedures, is amended by deleting part (2)(b)1. in its entirety and substituting instead the following language, and is further amended by adding the following language as new part (2)(b)2. and re-numbering the remaining parts appropriately, so that as amended, the new parts (2)(b)1. and (2)(b)2. shall read:

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| (2)(b)1. | Less than 6 beds | \$ 200.00 |
| (2)(b)2. | 6 to 25 beds, inclusive | \$ 600.00 |

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-209, 68-11-210, and 68-11-216.

Rule 1200-8-11-.07, Building Standards, is amended by deleting paragraphs (3), (5), (8), subparagraph (10)(a), and paragraph (12) in their entirety and substituting instead the following language, so that as amended, the new paragraphs (3), (5), (8), subparagraph (10)(a), and paragraph (12) shall read:

- (3) After the application and licensure fees have been submitted, the building construction plans must be submitted to the department. All new facilities shall conform to the edition of the Standard Building Code, ASHRAE Handbook of Fundamentals, National Fire Protection Code (NFPA), and the National Electrical Code. In addition, all new facilities shall conform to the handicap code as required by T.C.A. § 68-11-18-204(a). When referring to height, area or

construction type, the Standard Building Code shall prevail. All new and existing facilities are subject to the requirements of the Americans with Disabilities Act (A.D.A.). Where there are conflicts between requirements in the above listed codes and regulations and provisions of this chapter, the most restrictive shall apply.

- (5) No new home shall be constructed, nor shall major alterations be made to existing homes, or change in facility type be made without prior written approval, and unless in accordance with plans and specifications approved in advance by the department. Before any new home is licensed or before any alteration or expansion of a licensed home can be approved, the applicant must furnish two (2) complete sets of plans and specifications to the department, together with fees and other information as required. For those existing single family dwellings being converted into a residential home for the aged with six (6) or fewer beds, only one (1) set of schematics shall be submitted to the department for approval. Plans and specifications for new construction and major renovations, other than minor alterations not affecting fire and life safety or functional issues shall be prepared by or under the direction of a licensed architect and/or a qualified licensed engineer.
- (8) The codes in effect at the time of submittal of phased plans and specifications, as defined by these rules, shall be the codes to be used throughout the project.
- (10)(a) Two sets of plans shall be forwarded to the appropriate section of the department for review. After receipt of approval of the phased construction plans, if applicable, the owner may proceed with site grading and foundation work prior to receipt of approval of final plans and specifications with the understanding that such work is at the owner's risk and without assurance that final approval of final plans and specifications shall be granted. Final plans and specifications shall be submitted for review and approval. Final approval must be received before proceeding beyond foundation work.
- (12) Review of plans and specifications shall be acknowledged in writing with copies sent to the architect and the owner, manager or other executive of the home for the aged. The distribution of such review may be modified at the discretion of the department.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, and 68-11-209.

Rule 1200-8-11-.07, Building Standards, is amended by adding the following language as new paragraph (3) and re-numbering the remaining paragraphs appropriately, so that as amended, the new paragraph (3) shall read:

- (3) Construction and renovation projects shall provide for the safety and protection of residents and personnel.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, and 68-11-209.

Rule 1200-8-11-.08, Life Safety, is amended by deleting paragraph (2) in its entirety.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, and 68-11-209.

Rule 1200-8-11-.12, Policies and Procedures for Health Care Decision-Making for Incompetent Residents, is amended by deleting the rule in its entirety and renaming the rule 1200-8-11-.12, Policies and Procedures for Health Care Decision-Making, and substituting instead the following language, so that as amended, the new rule shall read:

- (1) Pursuant to this Rule, each home for the aged shall maintain and establish policies and procedures governing the designation of a health care decision-maker for making health care decisions for a resident who is incompetent or who lacks decision-making capacity, including but not limited to allowing the withholding of CPR measures from individual residents. An adult or emancipated minor may give an individual instruction. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.
- (2) An adult or emancipated minor may execute an advance directive for health care, which may authorize a surrogate or other person authorized to make any health care decision the resident could have made while having capacity. The advance directive must be in writing and signed by the resident. The advance directive must either be notarized or witnessed by two (2) witnesses and shall contain a clause that attests that the witnesses will comply with requirements of the advance directive. An advance directive remains in effect notwithstanding the resident's last incapacity and may include individual instructions. A witness shall be a competent adult, who is not the surrogate or health care decision-maker, and at least one (1) of whom is not related to the resident by blood, marriage, or adoption and would not be entitled to any portion of the estate of the resident upon the death of the resident.
- (3) Unless otherwise specified in an advance directive, the authority of a surrogate or health care decision-maker becomes effective only upon a determination that the resident lacks capacity, and ceases to be effective upon a determination that the resident has recovered capacity.
- (4) A facility may use any advance directive form meeting statute or that has been adopted by the Department.
- (5) A determination that a resident lacks or has recovered capacity, or that another condition exists that affects a resident instruction or the authority of a surrogate or health care decision-maker shall be made by the designated physician, who is authorized to consult with such other persons as he or she may deem appropriate.

- (6) An agent shall make a health care decision in accordance with the resident's individual instructions, if any, and other wishes to the extent known to the surrogate or health care decision-maker. Otherwise, the surrogate or health care decision-maker shall make the decision in accordance with the resident's best interest. In determining the resident's best interest, the surrogate or health care decision-maker shall consider the resident's personal values to the extent known.
- (7) An advance directive may include the individual's nomination of a court-appointed guardian.
- (8) A health care facility shall honor an advance directive that is executed outside of this state by a nonresident of this state at the time of execution shall be given effect in this state if that advance directive is in compliance with the laws of Tennessee or the state of the resident's residence.
- (9) No health care provider or institution shall require the execution or revocation of an advance directive as a condition for being insured for, or receiving, health care.
- (10) Any living will, durable power of attorney for health care, or other instrument signed by the individual, complying with Tennessee Code Annotated, Title 32, Chapter 11, and a durable power of attorney for health care complying with the terms of Tennessee Code Annotated, Title 34, Chapter 6, Part 2, shall remain in effect. Any advance directive that does not comply with prior statutes as referenced above but complies with the Health Care Decisions Act (T.C.A. § 68-11-1701) may be treated as an advance directive.
- (11) A resident having capacity may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider.
- (12) A resident having capacity may revoke all or part of an advance directive, other than the designation of a surrogate or health care decision-maker, at any time and in any manner that communicates an intent to revoke.
- (13) A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as an agent unless otherwise specified in the decree or in an advance directive.
- (14) An advance directive that conflicts with an earlier advance directive revokes the earlier directive to the extent of the conflict.
- (15) Surrogates.
 - (a) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. The designation may be oral or written.

- (b) A surrogate may make a health care decision for a resident who is an adult or emancipated minor if and only if:
 - 1. the resident has been determined by the designated physician to lack capacity, and
 - 2. no surrogate or guardian has been appointed, or
 - 3. the surrogate or guardian is not reasonably available.
- (c) In the case of a resident who lacks capacity, the resident's surrogate shall be identified by the supervising health care provider and documented in the current clinical record of the facility at which the resident is receiving health care.
- (d) The resident's surrogate shall be an adult who has exhibited special care and concern for the resident, who is familiar with the resident's personal values, who is reasonably available, and who is willing to serve.
- (e) Consideration may be given in order of descending preference for service as a surrogate to:
 - 1. the resident's spouse, unless legally separated;
 - 2. the resident's adult child;
 - 3. the resident's parent;
 - 4. the resident's adult sibling;
 - 5. any other adult relative of the resident; or
 - 6. any other adult who satisfies the requirements of 1200-8-11-.12(15)(d).
- (f) No person who is the subject of a protective order or other court order that directs that person to avoid contact with the resident shall be eligible to serve as the resident's surrogate.
- (g) The following criteria shall be considered in the determination of the person best qualified to serve as the surrogate:
 - 1. Whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the resident or in accordance with the resident's best interests;

2. The proposed surrogate's regular contact with the resident prior to and during the incapacitating illness;
 3. The proposed surrogate's demonstrated care and concern;
 4. The proposed surrogate's availability to visit the resident during his or her illness; and
 5. The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the decision-making process.
- (h) If none of the individuals eligible to act as a surrogate under 1200-8-11-.12(15)(c) thru 1200-8-11-.12(15)(g) is reasonably available, the designated physician may make health care decisions for the resident after the designated physician either:
1. Consults with and obtains the recommendations of a facility's ethics mechanism or standing committee in the facility that evaluates health care issues; or
 2. Obtains concurrence from a second physician who is not directly involved in the resident's health care, does not serve in a capacity of decision-making, influence, or responsibility over the designated physician, and is not under the designated physician's decision-making, influence, or responsibility.
- (i) In the event of a challenge, there shall be a rebuttable presumption that the selection of the surrogate was valid. Any person who challenges the selection shall have the burden of proving the invalidity of that selection.
- (j) A surrogate who has not been designated by the resident may make all health care decisions for the resident that the resident could make on the resident's own behalf, except that artificial nutrition and hydration may be withheld or withdrawn for a resident upon a decision of the surrogate only when the designated physician and a second independent physician certify in the resident's current clinical records that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the resident is highly unlikely to regain capacity to make medical decisions.
- (k) Except as provided in 1200-8-11-.12(15)(l):
1. Neither the treating health care provider nor an employee of the treating health care provider, nor an operator of a health care

facility nor an employee of an operator of a health care facility may be designated as a surrogate; and

2. A health care provider or employee of a health care provider may not act as a surrogate if the health care provider becomes the resident's treating health care provider.
- (l) An employee of the treating health care provider or an employee of an operator of a health care facility may be designated as a surrogate if:
 1. the employee so designated is a relative of the resident by blood, marriage, or adoption; and
 2. the other requirements of this section are satisfied.
 - (m) A health care provider may require an individual claiming the right to act as surrogate for a resident to provide written documentation stating facts and circumstances reasonably sufficient to establish the claimed authority.
- (16) Guardian.
- (a) A guardian shall comply with the resident's individual instructions and may not revoke the resident's advance directive absent a court order.
 - (b) Absent a court order, a health care decision of an agent takes precedence over that of a guardian.
- (17) A designated physician who makes or is informed of a determination that a resident lacks or has recovered capacity, or that another condition exists which affects an individual instruction or the authority of a health care decision-maker, guardian, or surrogate, shall promptly record the determination in the resident's current clinical record and communicate the determination to the resident, if possible, and to any person then authorized to make health care decisions for the resident.
- (18) Except as provided in 1200-8-11-.12(19) thru 1200-8-11-.12(21), a health care provider or institution providing care to a resident shall:
- (a) comply with an individual instruction of the resident and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the resident; and
 - (b) comply with a health care decision for the resident made by a person then authorized to make health care decisions for the resident to the same extent as if the decision had been made by the resident while having capacity.

- (19) A health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience.
- (20) A health care facility may decline to comply with an individual instruction or health care decision if the instruction or decision:
 - (a) is contrary to a policy of the facility which is based on reasons of conscience, and
 - (b) the policy was timely communicated to the resident or to a person then authorized to make health care decisions for the resident.
- (21) A health care provider or facility may decline to comply with an individual instruction or health care decision that requires medically inappropriate health care or health care contrary to generally accepted health care standards applicable to the health care provider or facility.
- (22) A health care provider or facility that declines to comply with an individual instruction or health care decision pursuant to 1200-8-11-.12(19) thru 1200-8-11-.12(21) shall:
 - (a) promptly so inform the resident, if possible, and any person then authorized to make health care decisions for the resident;
 - (b) provide continuing care to the resident until a transfer can be effected or until the determination has been made that transfer cannot be effected;
 - (c) unless the resident or person then authorized to make health care decisions for the resident refuses assistance, immediately make all reasonable efforts to assist in the transfer of the resident to another health care provider or facility that is willing to comply with the instruction or decision; and
 - (d) if a transfer cannot be effected, the health care provider or facility shall not be compelled to comply.
- (23) Unless otherwise specified in an advance directive, a person then authorized to make health care decisions for a resident has the same rights as the resident to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.
- (24) A health care provider or facility acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or facility is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

- (a) complying with a health care decision of a person apparently having authority to make a health care decision for a resident, including a decision to withhold or withdraw health care;
 - (b) declining to comply with a health care decision of a person based on a belief that the person then lacked authority; or
 - (c) complying with an advance directive and assuming that the directive was valid when made and has not been revoked or terminated.
- (25) An individual acting as health care decision-maker or surrogate is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.
- (26) A person identifying a surrogate is not subject to civil or criminal liability or to discipline for unprofessional conduct for such identification made in good faith.
- (27) A copy of a written advance directive, revocation of an advance directive, or designation or disqualification of a surrogate has the same effect as the original.
- (28) The withholding or withdrawal of medical care from a resident in accordance with the provisions of Tennessee Health Care Decisions Act shall not, for any purpose, constitute a suicide, euthanasia, homicide, mercy killing, or assisted suicide.
- (29) Do Not Resuscitate (DNR).
 - (a) A universal do not resuscitate order (DNR) may be issued by a physician for his patient with whom he has a physician/patient relationship, but only:
 - 1. with the consent of the patient; or
 - 2. if the patient is a minor or is otherwise incapable of making an informed decision regarding consent for a DNR order, upon the request and consent of the person authorized to act on the patient's behalf under the Tennessee Health Care Decisions Act; or
 - 3. if one (1) and two (2) cannot be met the physician determines that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards.
 - (b) If the resident is an adult who is capable of making an informed decision, the resident's expression of the desire to be resuscitated in the event of cardiac or respiratory arrest shall revoke a universal do not resuscitate order. If the resident is a minor or is otherwise incapable of making an informed decision, the expression of the desire that the resident be

resuscitated by the person authorized to consent on the resident's behalf shall revoke a universal do not resuscitate order.

- (c) Universal do not resuscitate orders shall remain valid and in effect until revoked. Qualified emergency medical services personnel, and licensed health care practitioners in any facility, program or organization operated or licensed by the board for licensing health care facilities or by the department of mental health and developmental disabilities or operated, licensed, or owned by another state agency are authorized to follow universal do not resuscitate orders.
- (d) Nothing in these rules shall authorize the withholding of other medical interventions, such as intravenous fluids, oxygen, or other therapies deemed necessary to provide comfort care or to alleviate pain.
- (e) If a person with a universal do not resuscitate order is transferred from one health care facility to another health care facility, the health care facility initiating the transfer shall communicate the existence of the universal do not resuscitate order to the receiving facility prior to the transfer. The transferring facility shall assure that a copy of the universal do not resuscitate order accompanies the resident in transport to the receiving health care facility. Upon admission, the receiving facility shall make the universal do not resuscitate order a part of the resident's record.
- (f) This section shall not prevent, prohibit, or limit a physician from issuing a written order, other than a universal do not resuscitate order, not to resuscitate a resident in the event of cardiac or respiratory arrest in accordance with accepted medical practices.
- (g) Valid do not resuscitate orders or emergency medical services do not resuscitate orders issued before July 1, 2004, pursuant to the then-current law, shall remain valid and shall be given effect as provided.

Authority: T.C.A. §§4-5-202, 4-5-204, 68-11-202, 68-11-204, 68-11-206, 68-11-209, 68-11-224, 68-11-1703, 68-11-1704, 68-11-1706 through 68-11-1710, 68-11-1713, and 68-11-1714.

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Contact who can answer questions concerning this notice of rulemaking hearing, technical contact for disk acquisition, and person who will approve final copy for publication: Steve Goodwin, Health Facility Survey Manager, Division of Health Care Facilities, 1st Floor, Cordell Hull Building, 425 5th Avenue North, Nashville, TN 37247-0508, (615) 741-7598.

I certify that this is an accurate and complete representation of the intent and scope of rulemaking proposed by the Tennessee Board for Licensing Health Care Facilities.

Cathy Green, Director
Board for Licensing Health Care Facilities

Subscribed and sworn to before me this the 9th day of August, 2004.

Notary Public

My commission expires on the 27th day of January, 2007.

The notice of rulemaking set out herein was properly filed in the Department of State on the ____ day of _____, 2004.

Riley C. Darnell
Secretary of State

By: _____